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## Summary Seizure of Personalty to Satisfy Delinquent Taxes: The Predictable Death of West Virginia's Distrain Statute

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## Summary Seizure of Personality to Satisfy Delinquent Taxes: The Predictable Death of West Virginia's Distraint Statute

### I. INTRODUCTION

Taxes are an inevitable incident of the American way of life. Indeed, the West Virginia Supreme Court of Appeals has held that it is the duty of all citizens to "contribute to the burdens of taxation, necessary to the existence of the State, whose government is set up for their benefit and protection."<sup>1</sup> Nonetheless, many citizens do not fulfill their obligation to discharge taxes levied upon their property and, as such, contribute aggregately to the severe shortage of revenue throughout many counties within West Virginia.<sup>2</sup>

Because the prompt payment of taxes is both vital to the public welfare and requisite to the continued existence and function of state and local governments, the states have traditionally been granted broad powers to determine the mode, form, and extent of taxation within their borders.<sup>3</sup> Consequently, courts have held that the taxation power of the states is limited solely by the provisions of the federal Constitution.<sup>4</sup> In a decision just prior to the turn of the century, the West Virginia Supreme Court of Appeals recognized the breadth of this state's taxing power over its citizens:

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1. *State v. Gray*, 132 W. Va. 472, 501, 52 S.E.2d 759, 774, *appeal dismissed*, 338 U.S. 855 (1949).

2. For a recent newspaper account of one county's attempts to collect rather substantial delinquent personal property taxes, see *County to Send Warning Notice of Back Taxes*, *Charleston Daily Mail*, Aug. 13, 1987 at 7b, col. 3.

3. *State v. Sponaugle*, 45 W. Va. 415, 419, 32 S.E. 283, 285 (1898).

In a recent case, the West Virginia Supreme Court of Appeals recognized that the public has a "paramount" need for regular tax income and that "property taxes are a principle [sic] source of revenue for local governments." *State ex rel. Ayres v. Cline*, 342 S.E.2d 89, 94 (W. Va. 1985).

4. *Sponaugle*, 45 W. Va. at 419, 32 S.E. at 295.

The *Sponaugle* court stated, "What is the limit of the taxing power, except by express provision of the Constitution? It scarcely has any. It is so nearly unlimited from sheer necessity. It involves the operation, nay, the very existence, of government. It is an original power, inherent in every government." *Id.* at 418, 32 S.E. at 285.

The power to impose taxes is one so unlimited in force and so searching in extent that the courts scarcely venture to declare that it is subject to any restrictions whatsoever, except such as rest in the discretion of the authority which exercises it. . . . No attribute of sovereignty is more pervading, and at no point does the government affect more constantly and intimately all the relations of life than through the exactions made under it.<sup>5</sup>

Since there have been few limitations placed upon the states in the promulgation and implementation of tax collection statutes, many states have enacted a variety of drastic summary administrative procedures to assist local officials in the collection of delinquent taxes.<sup>6</sup> One such procedure for the collection of delinquent ad valorem personal property taxes in West Virginia is the antiquated remedy of distraint.<sup>7</sup> Under West Virginia's distraint statute,<sup>8</sup> a sheriff or other appointed county official may summarily enter upon the lands of a delinquent taxpayer for the purpose of "distraining" or seizing the citizen's personal property.<sup>9</sup> However, local officials apparently

5. *Id.* at 419, 32 S.E. at 285.

6. "Summary" in this context refers to a short and immediate administrative proceeding by which a controversy is settled pursuant to statutory powers and without judicial involvement. The proceeding occurs in the absence of a jury, "without presentment or indictment," and is "in other respects out of the regular course of the common law." BLACK'S LAW DICTIONARY 1084 (5th ed. 1979).

For an identification of states which have historically implemented summary tax collection procedures, see generally Note, *Procedural Due Process in Tax Collection: An Opportunity for a Prompt Postdeprivation Hearing*, 44 U. CHI. L. REV. 594 (1977).

7. W. VA. CODE § 11A-2-3 (1987).

For an interesting explanation of the feudal practice of distress from which the practice of distraint of personalty in this country originated, see 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF THE ENGLISH LAW* 353 (2d ed. 1923).

8. The distraint statute for the collection of delinquent real estate and personal property taxes which is the subject of this Note should be distinguished from another West Virginia distraint provision for the collection of delinquent state taxes as contained in West Virginia's Tax Procedure and Administration Act, W. VA. CODE § 11-10-1 & § 11-10B-1 (1987).

The latter statute specifically excludes ad valorem real and personal property taxes from its application and contains a number of built-in procedural due process safeguards to protect the citizen's property interests which are completely absent from the distraint statute at issue in this Note. W. VA. CODE § 11-10-13 & § 11-10-13k (1987).

9. "Distraint" as defined by the dictionary refers to the process of seizure or "the act of . . . making a distress."

Likewise, "distress" refers to the seizure of personal property to enforce payment of taxes, followed by public sale of the property if the taxes are not satisfied. BLACK'S LAW DICTIONARY, *supra* note 6, at 426.

Professors Pollock and Maitland have noted that the term is often used incorrectly: "Observe that when words are correctly used, one does not distraint a thing; one distrains a man by (per) a thing." F. POLLOCK & F. MAITLAND, *supra* note 8, at 321, 676.

do not resort to the distraint procedure for the collection of personal property taxes, due in part to a concern that the statutory procedure may be constitutionally flawed.<sup>10</sup> Even so, because the statute remains in full force and effect, local officials are technically not precluded from pursuing the procedure as a means of facilitating tax collection.<sup>11</sup>

Case law reveals that, historically, there has been a more relaxed application of procedural due process principles in tax collection proceedings than in the debtor-creditor context.<sup>12</sup> In fact, the Supreme Court has held that, because of the vital governmental interest of maintaining adequate revenue, even summary methods of tax collection are justifiable.<sup>13</sup> The modern trend of judicial decision reveals, however, that the Supreme Court has generally broadened its sensitivity to individual rights and has engrafted certain minimum procedural due process requirements for state statutes to pass constitutional muster.<sup>14</sup> Consequently, a growing number of state debt and tax collection procedures have been declared unconstitutional due to inadequate preseizure notice and hearing requirements.<sup>15</sup>

Clearly, any statutory provision which purports to grant state officials the power to summarily deprive citizens of property without even the most fundamental procedural safeguards presents serious constitutional questions and must be subjected to careful legislative and judicial scrutiny. This Note will provide a constitutional analysis of West Virginia's distraint statute. The conclusions herein are based

10. Telephone interview with Robert Hoffman, West Virginia State Tax Department, Property Tax Division (Aug. 12, 1987).

These concerns are founded primarily upon the procedural aspect of the due process clause as articulated in the fourteenth amendment to the Constitution: "Nor shall the State deprive any person of life, liberty or property without due process of law." U.S. CONST. amend. XIV; *see also* W. VA. CONST. art. 3, § 10.

11. *See generally* 18 MICHIE'S JUR. *Taxation* § 85 (1985): "In West Virginia . . . the sheriff may distraint for delinquent (taxes) any goods and chattels belonging to a person assessed, and the distraint may be applied to collect taxes assessed against goods and chattels, even though they have been transferred to another person." *Id.* at 287.

12. *See, e.g.,* *Phillips v. Commissioner*, 283 U.S. 589 (1931).

13. *Id.* *See also* *Commissioner v. Shapiro*, 424 U.S. 614 (1976).

14. *See, e.g.,* *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

15. *See, e.g.,* *Sniadach*, 395 U.S. 337; *Yanero v. Fox*, 163 W. Va. 222, 256 S.E.2d 751 (1979); *Payne v. Walden*, 156 W. Va. 60, 190 S.E.2d 770 (1972).

upon a review of modern judicial decisions which have scrutinized the constitutionality of a variety of similar statutory provisions on procedural due process grounds.

The author concludes that legislative reform is necessary if West Virginia's distraint statute is to have a substantial role in the collection of delinquent personal property taxes. Such reform will not only ensure that our citizens are provided procedural due process of law prior to deprivation of their property, but will also ensure that local officials are provided with a practical, efficient, and constitutionally sound method of revenue collection.

## II. WEST VIRGINIA'S STATUTORY SCHEME FOR COLLECTION OF DELINQUENT PERSONAL PROPERTY TAXES

West Virginia's Supreme Court of Appeals recognized in *State v. Gray*<sup>16</sup> that a state's right to levy taxes upon property within its borders would be empty without the coexistent power to enforce the payment of such taxes. The court held that "the right to enforce the payment of . . . taxes necessarily carries with it the right to proceed against delinquents, either by creating a lien on the thing taxed, or otherwise, as the Legislature may prescribe."<sup>17</sup>

In West Virginia, the county sheriff or other appointed official is statutorily designated the responsibility of collecting taxes levied upon property within his county.<sup>18</sup> Whenever local taxes become delinquent, he is required to take immediate steps to enforce payment of taxes pursuant to one of the methods specifically prescribed by the law.<sup>19</sup> The Code provides local officials with several statutory methods to collect delinquent ad valorem personal property taxes,<sup>20</sup>

16. *Gray*, 132 W. Va. at 487, 52 S.E.2d at 768.

17. *Id.* The court continued: "As is well known, the taxing power is vested solely in the Legislature, and so long as it does not amount to confiscation is virtually unlimited." *Id.*

18. W. VA. CODE § 11A-1-4 provides that the sheriff, as ex-officio county treasurer, shall collect all taxes levied in his county or, alternatively, the county commission may appoint a collector in any county when it is necessary to collect such taxes. W. VA. CODE § 11A-1-5. Once taxes become delinquent, the Code expressly provides: "[It] shall be the duty of the sheriff to take immediate steps to enforce payment by use of the methods prescribed in sections two, three, and seven [§§ 11A-2-2, -3, & -7] of this article." W. VA. CODE § 11A-2-1 (1987).

19. W. VA. CODE § 11A-2-1 (1987).

20. W. VA. CODE § 11A-2-1 to -7 (1987). See generally 18 MICHIE'S JUR., *supra* note 11, § 96

including collection of taxes by a suit in execution,<sup>21</sup> collection by distraint of personalty,<sup>22</sup> and collection out of money due from or held by another.<sup>23</sup> The distraint procedure for the collection of delinquent personal property taxes reads in pertinent part:

The sheriff may, as soon as taxes become delinquent, distrain any goods or chattels in the county belonging to the person or to the estate in land assessed with the taxes. If such goods or chattels are about to be removed from the county, the sheriff may distrain even before delinquency. . . .<sup>24</sup>

The antiquated roots of the distraint procedure can be traced to feudal times when feudal lords could summarily seize a tenant's goods or chattels for payment of overdue rents, services or other

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21. W. VA. CODE § 11A-2-2 (1987). Although local officials may resort to a lawsuit for the collection of delinquent personal property taxes, the economic costs and the requisite prosecutorial involvement often preclude resort to this method of collection when the unpaid personal property taxes are minimal. In perhaps the majority of instances, suit is resorted to for the collection of large unpaid personal property tax debts from businesses within the State. Unfortunately, however, in many instances these businesses are also in bankruptcy and the likelihood of successful collection of the tax is minimal. See, e.g., Charleston Daily Mail article, *supra* note 2.

22. W. VA. CODE § 11A-2-3 (1987). As a practical note, the statutory provisions relating to the distraint of personalty and the suit in execution are construed by most practicing attorneys as being applicable only to delinquent personal property taxes since there is an entire statutory provision relating to the sale of real estate for the delinquency of taxes assessed thereon. However, to this writer, a plain reading of the statutory language suggests that local officials have wide discretion in selecting the mode of collection for all property taxes within their borders and that any of the methods articulated in Chapter 11A of the Code may be utilized so long as the statute is not confined by its language to either real or personal property taxes.

In this regard, see generally 18 MICHIE'S JUR., *supra* note 11, § 96 at 299 and cases cited therein: The prompt collection of taxes by a governmental unit is vitally necessary to the discharge of its functions. Legislative recognition of this is evidenced by the several statutory methods, some of which are quite drastic, for example, right of distress, which are provided for the collection of taxes. *There is no statutory requirement that a governmental unit should adopt one method rather than another.*

*Id.* (emphasis added).

23. W. VA. CODE § 11A-2-7 (1987).

24. The corollary statutes within the distraint of personalty procedure as contained in the W. VA. CODE state:

[W. VA. CODE § 11A-2-4:] Whenever by mistake taxes are assessed wholly to one person or estate on a tract or lot of land, part of which has become the freehold of another, . . . the goods and chattels of the party or estate so assessed shall not be liable to distraint for more than a due proportion of such taxes.

[W. VA. CODE § 11A-2-5:] No trust deed, mortgage or sale of goods and chattels shall prevent their being distrained for all taxes assessed against the grantor or former owner thereof, while such goods and chattels remain in his possession; nor shall such deed, mortgage or sale prevent their being distrained for taxes assessed on such goods and chattels, no matter in whose possession they may be found.

debts.<sup>25</sup> As one early treatise on the English common law summarized:

The landlord's handiest remedy is that of distraining his tenant to perform the services that are in arrear. This means that, carefully observing certain rules as to when and where and what he may seize, he takes the chattels that are found upon the tenement and keeps them until the tenant either tenders the arrears or finds security to contest in a court of law the justice of the seizure.<sup>26</sup>

In West Virginia's statutory scheme, the county sheriff, as ex-officio treasurer, acts as a ministerial officer whose actions are not subject to the supervision or order of the courts.<sup>27</sup> Thus, if a sheriff elects to distrain personalty pursuant to this provision, he may, without prior judicial approval, enter the citizen's home or business to seize personal property "as soon as taxes become delinquent," or more disturbingly, "even before delinquency."<sup>28</sup>

The distraint statute also allows the county sheriff to distrain a delinquent taxpayer's personalty without providing prior notice of the intent to distrain, without notice of the specific property to be distrained, and without notice of the date, time, and place of the sale of the property following distraint. Additionally, the statute does not require that the taxpayer be provided with any form of pre- or post-seizure hearing; does not require that the delinquent taxpayer be provided the right to redeem his property for a specified period, and does not provide any practical guidance regarding the

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25. In one famous early treatise on the history of English law, Professors Pollock and Maitland summarized: "The practice of distraining one's adversary, that is taking things from him and keeping them, so that by a desire to recover them he may be compelled to pay money or do some other act, is doubtless very ancient." 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF THE ENGLISH LAW* 574-75 (2d ed. 1923).

See also I. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 388 (5th ed. 1956).

For reference to sources which specifically trace the antiquated origins of the summary collection of revenue, see, e.g., *Phillips*, 283 U.S. at 595 n.5.

26. 1 F. POLLOCK & F. MAITLAND, *supra* note 7, at 323.

27. See generally 18 MICHIE'S JUR., *supra* note 11, § 96 at 299:

A sheriff, in a levy and sale for taxes, is a ministerial officer, his action therein being subject to no supervision or order of a court, and as in levy and sale under execution, is constituted in law the agent of the owner of the property without his consent. The law imposes upon such officer the duty to act fairly in making such levy and sale.

28. W. VA. CODE § 11A-2-3 (1987). Although the issue is necessarily beyond the scope of this Note, there are significant fourth amendment concerns regarding seizure of a citizen's property without a valid warrant. See, e.g., *Bormann v. Tomlin*, 461 F. Supp. 193, 198 (S.D. Ill. 1975), *aff'd*, 662 F.2d 592 (7th Cir. 1980).

proper conduct of the sale of the property following distraint.<sup>29</sup>

In West Virginia, there is no express statutory provision placing a lien upon personal property for delinquent taxes.<sup>30</sup> Nevertheless, the distraint statute expressly provides that sale or mortgage of the personal property will not affect the delinquent taxes due the state. Rather, the goods and chattels upon which the delinquent taxes were assessed may be distrained, even in the hands of a bona fide purchaser. The statute reads:

No trust deed, mortgage or sale of goods and chattels shall prevent their being distrained for all taxes assessed against the grantor or former owner thereof, while such goods and chattels remain in his possession; *nor shall such deed, mortgage or sale prevent their being distrained for taxes assessed on such goods and chattels, no matter in whose possession they may be found.*<sup>31</sup>

Clearly, the distraint procedure as currently written contains marked procedural defects which, as a practical matter, preclude the effective use of the statute in the collection of delinquent personal property taxes. Likewise, the absence of any provision requiring that the delinquent taxpayer be afforded some form of notice and the opportunity to be heard prior to the distraint of his property has caused local officials to avoid utilizing the distraint procedure in the collection of local taxes. In light of such constitutional concerns, it is helpful to examine the historical evolution of procedural due process in taxation cases before attempting to ascertain whether the distraint statute, as written, could survive judicial scrutiny.

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29. For a fair and consistent application of any tax sale proceeding, such guidelines should include, *inter alia*, information regarding the length of time the property should be held prior to sale, and information regarding the specific nature of the sale proceeding (sale by auction, closed bid, etc.). It is interesting to note that another West Virginia distraint statute for the collection of various state taxes had similar procedural defects until its amendment in 1986. See W. VA. CODE §§ 11-10-13 to -13k.

30. One West Virginia case has stated in dicta, however, that the statutory language in W. VA. CODE § 11A-2-5 is, for all practical purposes, no different from a statutory lien on personal property. The fact remains, however, that there is absolutely no statutory method provided for perfecting such a lien, even if it is so construed judicially. See *Hazelwood v. Pitsenbarger*, 149 W. Va. 485, 141 S.E.2d 314, *appeal dismissed*, 382 U.S. 201 (1965).

31. W. VA. CODE § 11A-2-5 (1987) (emphasis supplied).

There is, however, a statutory lien placed upon real property for delinquent taxes in West Virginia. See W. VA. CODE § 11A-1-2 (1987). See also 18 MICHIE'S JUR., *supra* note 11, § 85 at 285. Disseminated by The Research Repository at WVU, 1988



### III. HISTORICAL EVOLUTION OF PROCEDURAL DUE PROCESS IN TAX COLLECTION CASES

The basic principles of procedural due process require that, prior to the deprivation of private property by governmental action, a citizen must be afforded notice and an opportunity to be heard. However, in cases where governmental action serves a particularly urgent need, the Supreme Court has taken a more relaxed approach.<sup>32</sup> In a series of cases dating to the late 1800's, the Supreme Court held that taxation cases stand on different constitutional due process footing than other debtor-creditor cases.<sup>33</sup> The Court premised these early cases on the theory that the prompt and efficient collection of revenue was of such vital importance that summary proceedings were warranted and were not violative of due process.<sup>34</sup>

For example, in *Phillips v. Commissioner*,<sup>35</sup> a case addressing the constitutionality of a federal tax collection procedure, the Supreme Court held that the right of the federal government to collect its revenue by summary administrative proceedings was a justifiable exercise of governmental power. The court stated, "[s]ummary proceedings to secure prompt performance of pecuniary obligation to the government have consistently been sustained. . . . Property rights must yield provisionally to governmental need."<sup>36</sup> Although *Phillips* dealt specifically with a federal income tax collection scheme, many states have construed the holding as being dispositive of the constitutionality of summary collection remedies for delinquent state property taxes.<sup>37</sup>

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32. See generally Annotation, *Supreme Court's Views as to Propriety Under Federal Constitution's Due Process Guarantee, of Summary Administrative Deprivations of Property Interests*, 69 L. Ed.2d 1044 (1982) [hereinafter *Supreme Court's Views*].

33. See, e.g., *Murray v. Hoboken Land Improvement Co.*, 59 U.S. 272 (1855) (no violation of fifth amendment resulting from U.S. Marshal's summary seizure of property pursuant to distress warrant for large federal tax debt); *McMillen v. Anderson*, 95 U.S. 37 (1887) (No fourteenth amendment violation by collection of taxes via summary seizure of property for citizen's failure to pay taxes); *Springer v. United States*, 102 U.S. 586 (1881) (no fifth amendment violation resulting from district collector's seizure, advertisement, and sale of property for income tax); *Phillips*, 283 U.S. 589.

34. *Id.*

35. *Phillips*, 283 U.S. 589.

36. *Id.* at 595.

37. See generally Note, *Summary Collection Remedies for Delinquent State Property Taxes*, 16

Similarly, in several early decisions, the West Virginia Supreme Court of Appeals held that summary procedures for the collection of delinquent state property taxes were constitutionally adequate.<sup>38</sup> In *State v. Sponaugle*,<sup>39</sup> the court of appeals was called upon to determine whether the fourteenth amendment served to limit the State's ability to resort to summary tax collection procedures. The court concluded that such procedures, a part of the law of this state since its succession from the Commonwealth of Virginia, were a necessary correlate of the sovereign taxation power. In this early decision, our Supreme Court of Appeals eloquently stated:

Did [the fourteenth] amendment come to overthrow this long-established law of the land? That amendment came to defend existing personal rights against unusual, arbitrary actions of the states, operating to prejudice [the citizen in his] essential rights; but *I cannot think that it came to defend him against the exercise by the state of its usual powers, under its fixed policy, in a governmental function so indispensable as the collection of revenue . . .*<sup>40</sup>

The *Sponaugle* court further postulated that the assessment, levy, and collection of taxes, as an administrative rather than judicial function, is consonant with due process of law. The court stated, "[t]ax proceedings have been, from necessity, exercised by governments . . . by summary methods of procedure. These methods were in exercise and existence long before the adoption of the Constitution, and have never been supposed to be affected thereby."<sup>41</sup> Several decades later, our court of appeals still adhered unwaveringly to the premise that due process requirements in taxation cases are much less stringent than in other debt collection proceedings under the common law.<sup>42</sup> In *State v. Gray*,<sup>43</sup> our court stated:

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38. See, e.g., *Sponaugle*, 45 W. Va. 415, 32 S.E. 283; *Younger v. Meadows*, 63 W. Va. 275, 59 S.E. 1087 (1907).

39. *Sponaugle*, 45 W. Va. 415, 32 S.E. 283.

40. *Id.* at 420-21, 32 S.E. at 285 (emphasis supplied). The court continued: The authorities show that the state can select its subjects of taxation, and select its mode of enforcement and collection. It can distrain personal property and sell it. It can sell realty. . . . This was 'due process of law' of Virginia in this matter of taxation, and complies with the demand of the fourteenth amendment.

*Id.*

41. *Id.*

42. *Gray*, 132 W. Va. 472, 52 S.E.2d 759.

43. *Id.*

*Summary remedies have been allowed, in every age and country, for the collection by the government of its revenue. . . . The protective principles of the common law are not supposed to be violated by a resort to summary proceedings in these cases. Summary processes are not necessarily unjust, . . . . There is a tacit condition annexed to the ownership of property that it shall contribute to the public revenue in such mode and proportion as the legislative will shall direct.<sup>44</sup>*

More recently, however, the United States Supreme Court has issued a number of landmark decisions which evidence the Court's modern approach to procedural due process, an approach which is strongly committed to the protection of individual rights.<sup>45</sup> The impact of these decisions has already been felt in the taxation area with several judicial decisions, both state and federal, holding that state property tax collection statutes which do not provide certain minimum procedural safeguards will not survive constitutional scrutiny.<sup>46</sup> Such decisions, although not definitive of the procedural requirements for personal property tax collection remedies, nonetheless provide a sound basis by which to assess the constitutional adequacy of West Virginia's distraint statute.

#### IV. PROCEDURAL DUE PROCESS REQUIREMENTS AND THE DEPRIVATION OF PRIVATE PROPERTY INTERESTS

The due process clause of the fourteenth amendment possesses a procedural element which guarantees to each citizen that he shall be accorded certain minimal processes prior to the deprivation of life, liberty, or property.<sup>47</sup> Thus, "[w]hen the power of government is to be used against an individual, there is a right to a fair procedure in order to determine the basis for, and legality of, such action."<sup>48</sup>

When, as in the application of West Virginia's distraint statute, a local government acts to deprive a citizen of a vested property interest, the general rule is that procedural due process requires that the citizen be provided with pre seizure notice and the opportunity

44. *Id.* at 506, 52 S.E.2d at 777 (emphasis added).

45. See, e.g., *Mullane v. Central Hanover Nat'l Bank*, 339 U.S. 306 (1950); *Sniadach*, 395 U.S. 337; *Fuentes*, 407 U.S. 67.

46. See, e.g., *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983); see also *Don S. Co. v. Roach*, 285 S.E.2d 491 (W. Va. 1981); *In re Tax Assessments Against Pocahontas Land Co.*, 303 S.E.2d 691 (W. Va. 1983).

47. U.S. CONST. amend. XIV.

48. *Chapman v. Houston*, 402 U.S. 964, 1970-1 C.M.A. 100, 101 (1970); *CONSTITUTIONAL LAW* 483-84 (1986).

to be heard.<sup>49</sup> As stated previously, however, there is an identifiable exception which legitimizes postponement of the requisite notice and hearing in cases where a substantial governmental or public interest is at stake.<sup>50</sup> Although some form of notice and hearing must be accorded all citizens prior to final deprivation of their property, the nature and timing of such procedures have been construed with wide variation and are necessarily dependent upon the facts and circumstances of each individual case.<sup>51</sup>

In order to accurately assess the constitutionality of any given state administrative procedure, one must necessarily examine the Court's past pattern of adjudication in the specific area of the law at issue. In examining the trend of judicial decisions regarding procedural due process in taxation cases, each of the two basic procedural elements, notice and hearing, will be analyzed as they apply specifically to the distraint statute at issue.

#### A. *The Constitutional Parameters of Notice in Tax Collection Proceedings*

West Virginia's distraint statute does not require notice to the delinquent taxpayer regarding the impending seizure of his property, nor any notice that the sale of such property will occur following the seizure.<sup>52</sup> However, the distraint statute must be read in conjunction with other code provisions regarding delinquency and methods of enforcing payment of real and personal property ad valorem taxes.

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49. *Id.* at 512.

50. See *Supreme Court's Views*, *supra* note 32, at 1047, see also J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 48, at 490.

51. For example, the Court has repeatedly held that preservation of the public health and safety may justify summary administrative deprivations of property. See, e.g., *Dixon v. Love*, 431 U.S. 105 (1977).

For a thorough overview of particular circumstances where the propriety of summary administrative action has been adjudicated by the Court, see generally *Supreme Court's Views*, *supra* note 32, at 1046-65.

52. In fact, the statutory scheme for the collection of delinquent personal property taxes is completely silent regarding the procedure which local officials are to follow in the sale of the personality, or even whether sale is the ultimate objective of distraint.

West Virginia Code § 11A-2-13 requires that county sheriffs prepare a listing of all delinquent real and personal property taxes within their counties on or before May 1 of the year next following that in which the taxes were assessed.<sup>53</sup> A copy of such listings are to be posted at the front door of the county courthouse at least two weeks prior to the session of the county commission at which they are to be examined, and are to be published as a Class I-0 legal advertisement in the county wherein the taxes were assessed.<sup>54</sup> Therefore, in the absence of any express notice provision within the distraint statute, and in view of the historic relaxation of procedural due process in taxation cases, it must be determined whether published notice of tax delinquency as currently prescribed by § 11A-2-3 is sufficient to overcome potential constitutional challenge.

During the early part of this century, several Supreme Court cases held that bare notice by publication in tax sale proceedings was constitutionally sufficient and was not violative of procedural due process.<sup>55</sup> In these early cases, the Court's conclusions were premised upon the legal fiction that tax sale proceedings were "in rem," since, by their nature, actions to enforce the payment of taxes were proceedings against the land or the thing taxed and not proceedings "in personam."<sup>56</sup>

"In rem" is a concept based upon the Court's previous ruling in *Pennoyer v. Neff*.<sup>57</sup> In *Pennoyer*, the Court addressed the states' problems of securing service of process over persons outside their

53. W. VA. CODE § 11A-2-13 (1987).

54. *Id.* See also W. VA. CODE § 59-3-1 (Supp. 1987) regarding the requisite elements of Class I-0 legal advertisements.

55. See, e.g., *Longyear v. Toolan*, 209 U.S. 414 (1908); *Ballard v. Hunter*, 204 U.S. 241 (1907), *rev'd.*, *Mullane*, 339 U.S. 306; *Leigh v. Green*, 193 U.S. 79 (1904).

56. For a representative sample of the Court's reasoning in these cases, see *Leigh*, 193 U.S. at 79, 90, 92-93, wherein the Court stated:

The statute undertakes to proceed in rem, by making the land, as such, answer for the public dues. . . . [W]here the state seeks directly or by authorization of others to sell land for taxes . . . it may proceed directly against the land within the jurisdiction of the court, and a notice which permits all interested who are 'so minded' to ascertain that it is to be subjected to sale to answer for taxes, and to appear and be heard, whether to be found within the jurisdiction or not, is due process of law within the Fourteenth Amendment of the Constitution.

57. *Pennoyer v. Neff*, 259 U.S. 43 (1922), overruled, *Shaffer v. Heitner*, 433 U.S. 186 (1977).<sup>12</sup>

territorial boundaries and held that, in “in rem” proceedings, notice by publication was constitutionally sufficient since the action was directed specifically against property within the state’s borders.<sup>58</sup>

However, in *Mullane v. Central Hanover Trust Company*,<sup>59</sup> the Court emasculated the “in rem” distinction and held that bare notice by publication would generally be inadequate, even for “in rem” proceedings. Articulating the general principles regarding adequacy of notice (that notice in all proceedings must be reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action),<sup>60</sup> the *Mullane* court held that a serious effort to provide personal service, at least by mail, is the minimum requisite to satisfy procedural due process. Only in those rare circumstances in which interested parties whose “whereabouts [can] not with due diligence be ascertained,” will notice by publication suffice.<sup>61</sup> Likewise, in those circumstances where the names and addresses of affected parties can be ascertained with due diligence, “the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.”<sup>62</sup>

Over the past two decades, numerous state courts have adhered to the *Mullane* standard of notice,<sup>63</sup> consistently holding that, at a minimum, the delinquent taxpayer must be provided notice which is reasonably calculated to apprise him of the pending sale of his property. Such notice ensures that, if desired, the taxpayer may take affirmative steps to satisfy his tax debt or to otherwise protect his interest in the subject property. It has also been held, however, that it is generally unnecessary to provide the delinquent taxpayer with notice *prior* to the seizure of his property, so long as adequate notice is provided prior to final sale thereof.<sup>64</sup>

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58. *Id.* See also *Ballard*, 204 U.S. 241.

59. *Mullane*, 339 U.S. 306. See also, Note, *The Constitutionality of Notice by Publication in Tax Sale Proceedings*, 84 YALE L.J. 1505 (1975).

60. *Mullane*, 339 U.S. at 314.

61. *Id.* at 318-19.

62. *Id.*

63. See, e.g., *Devine v. Whatcom County*, 71 Wash. 2d 215, 427 P.2d 731 (1967); *McMaster v. City of Santa Rosa*, 27 Cal. App. 3d 598, 103 Cal. Rptr. 749 (1972).

64. A number of courts have held that providing notice prior to seizure would not adequately protect the government’s interest. This theory is premised upon the notion that affording the taxpayer

In *Devine v. Whatcom County*,<sup>65</sup> the Supreme Court of Washington examined the scope of certain provisions within Washington's distraint statute. Although not scrutinizing the constitutionality of the distraint statute as a whole, the appellate court held that the tax collection proceeding had been "conducted with inadequate concern for the protection of the plaintiff's rights."<sup>66</sup> In *Devine*, the Washington appellate court applied the *Mullane* standard of notice and held that in order to meet minimum due process standards, every effort should be made to provide actual rather than constructive notice to the taxpayer prior to the final sale of his property.<sup>67</sup>

However, in a similar action, a California appellate court held in *McMaster v. City of Santa Rosa*<sup>68</sup> that constructive notice by publication of an impending property sale is "all the due process notice to which a delinquent taxpayer is entitled. . . ."<sup>69</sup> The court recognized that at least some form of notice is constitutionally mandated prior to the sale of distrainted property, since "[n]otice and due process are so inextricably part and parcel of each other that there can be no due process without the sovereign following some procedure which, according to common experience, should *reasonably give notice of impending interference with ownership or right of possession*."<sup>70</sup>

West Virginia's Supreme Court of Appeals has specifically addressed the scope of the requisite notice which must be afforded citizens in real property tax collection proceedings. Although the

with notice prior to seizure of the delinquent property would subject the government to the risk of the taxpayer's concealment or transfer of the property, or other dissipation of assets. Thus, jeopardy seizure has been deemed to be justifiable in light of the vital government interest at stake. See, e.g., *T.M. Cobb Co. v. County of Los Angeles*, 16 Cal. 3d 606, 547 P.2d 431, 128 Cal. Rptr. 655 (1976); *Devine*, 71 Wash. 2d 215, 427 P.2d 731.

65. *Devine*, 71 Wash. 2d 215, 427 P.2d 731.

66. *Id.* at 221, 427 P.2d at 732.

The *Devine* court made several general recommendations regarding what such notice should include: 1) The description of property to be sold should be clearly set forth; 2) The place of the sale should be pinpointed as carefully and accurately as possible; 3) The time of sale should be extended . . . to possibly 20-30 days after the distraint and posting of notice of sale; and 4) Every effort should be made to give actual rather than constructive notice to the owner of the property. *Id.*

67. *Id.*

68. *McMaster*, 27 Cal. App. 3d 598, 103 Cal. Rptr. 749.

69. *Id.* at 601-02, 103 Cal. Rptr. at 752.

70. *Id.* (emphasis added).

court has not yet been called upon to assess the constitutionality of our personal property tax collection scheme, it is likely that the same procedural elements required in the real property context would also be applicable when a citizen is to be deprived of personality for tax delinquency. Other courts which have specifically addressed the constitutionality of personal property tax collection statutes have not premised their decisions upon different procedural standards than are applied in real property cases.<sup>71</sup> Rather, the courts have adhered to the same constitutional standards to adjudge the adequacy of notice in personal property cases as is applied in other federal and state tax collection cases generally. In *Don S. Co. v. Roach*,<sup>72</sup> West Virginia's Supreme Court of Appeals recently declared its recognition of and respect for this state's "legitimate and vital interest" in the sale of delinquent lands as an aid to the collection of taxes.<sup>73</sup> However, equally as important, concluded the court, is the landowner's "vital interest in the continued possession and enjoyment of his real property."<sup>74</sup> Pertinent to the constitutionality of the distraint statute at issue in this Note, the court continued:

The right to own property is one of the fundamental rights which a citizen enjoys under our American system of government. The State may properly condition the enjoyment of that right upon the payment of taxes. However, *it is constitutionally impermissible for the State to foreclose a landowner's right to own property for the nonpayment of taxes without some type of fundamental notice of the landowner's duty to pay taxes, and that if he fails in this duty, the land may be sold.*<sup>75</sup>

Although consciously stopping short of assessing the constitutionality of notice by publication in real property tax collection proceedings, the court concluded that procedural due process was not afforded the plaintiff since he had not been given even the statutorily prescribed notice by publication.<sup>76</sup> Nonetheless, the court provided valuable prospective advice to West Virginia's legislature regarding

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71. See, e.g., *Borman*, 461 F. Supp. 193, *Shaw v. Phillips Crane & Rigging*, 636 S.W.2d 186 (Tex. 1982), *appeal dismissed*, 459 U.S. 1191 (1983).

72. *Don S. Co.*, 285 S.E.2d 491.

73. *Id.*

74. *Id.* at 495.

75. *Id.* (emphasis added).

76. *Id.* at 496.



the desired form of notice in future taxation cases. The court suggested that, at the initiation of tax collection proceedings, notice should be provided to the taxpayer which discloses that his failure to pay property taxes may result in the sale of the property upon which the taxes have been levied. Likewise, the notice should disclose that the delinquent taxpayer will lose all claim of title to the property following sale for delinquency if the property is not redeemed by payment of the taxes within the statutorily prescribed period of time.<sup>77</sup> Although *Don S. Co.* concerned the adequacy of notice in real property tax collection, the court's reasoning suggests that bare notice of tax delinquency by publication, as is currently provided for in West Virginia's personal property statutes, would be insufficient to impart adequate notice to any taxpayer that his property may be distrained and sold for delinquent taxes.

More recently, in *Cook v. Duncan*,<sup>78</sup> the court of appeals reemphasized its respect for "the importance of notice in our system of jurisprudence."<sup>79</sup> In *Cook*, the court was called upon to assess whether a landowner had been afforded sufficient notice regarding her right to redeem following the sale of her real property for delinquent taxes. The court stated:

Provision of notice of the right to redeem is essential in tax deed cases because it provides the delinquent taxpayer an opportunity to pay the tax obligation and retain title to property. *Generally speaking, notice of impending legal action makes the recipient aware that some action will soon be taken which may affect his life, liberty, or property, and is fundamental to due process.*<sup>80</sup>

The *Cook* court concluded that the notice which should be provided to delinquent landowners of the impending sale of their property should mirror the character of notice required for the commencement of a lawsuit.<sup>81</sup> Without such notice, concluded that court, the sale of property for delinquent taxes will be "fatally flawed."<sup>82</sup>

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77. *Id.*

78. *Cook v. Duncan*, 301 S.E.2d 837 (W. Va. 1983).

79. *Id.* at 841.

80. *Id.* (emphasis added).

81. *Id.*

82. *Id.* at 843.

Although both the *Don S.* and the *Cook* decisions concerned due process requirements in the sale of real property for tax delinquency, there is no logical reason that personal property owners should be accorded less constitutional protection than landowners in similar circumstances.

Just two months after West Virginia's Supreme Court of Appeals issued its *Cook v. Duncan* decision, the United States Supreme Court finally adjudicated the constitutionality of notice by publication in tax sale proceedings. In *Mennonite Board of Missions v. Adams*,<sup>83</sup> the Court reaffirmed its adherence to the *Mullane* principle of notice and held that publication and posting of tax delinquency are constitutionally inadequate to apprise interested parties of the impending sale of their property for delinquency.<sup>84</sup> Although *Mennonite* also concerned the constitutionality of a state real property tax collection scheme, the Court spoke in broad language regarding the constitutional parameters of notice without necessarily restricting the scope of its holding to the real property area. In holding that notice by publication is constitutionally insufficient to satisfy the *Mullane* standard, the Court stated:

Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed . . . . In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint.<sup>85</sup>

Justice Marshall, writing for a majority of six,<sup>86</sup> then held that notice by mail or any other means sufficient to effect *actual* notice upon

83. *Mennonite Bd. of Missions*, 462 U.S. 791.

84. *Id.* at 795.

85. *Id.* (citing *Mullane*, 339 U.S. at 315).

86. The majority was comprised of then Chief Justice Burger, and Justices Marshall, Brennan, White, Blackmun, and Stevens. Justice O'Connor, joined by Justices Powell and Rehnquist, dissented.

In the opinion of the dissenting Justices, the majority's opinion was representative of significant judicial usurpation of state lawmaking authority. Writing for the dissent, Justice O'Connor posited that the adequacy of notice is dependent upon the outcome of the "balance between the 'interest of the State' and 'the individual interest sought to be protected by the Fourteenth Amendment.'" She added, "[i]t is not our responsibility to prescribe the form of service that the [State] should adopt." *Id.* at 806.

In one informative footnote to the dissenting opinion, J. O'Connor criticized the majority's rationale:

The Court suggests that the notice that it requires 'may ultimately relieve the county of a more substantial administrative burden if the [plaintiff] arranges for payment of the delinquent taxes prior to the tax sale.' The Court neglects the fact that the State is a better judge of how it wants to settle its tax debts than this Court.

*Id.* at 806 n.4.

a citizen is "a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party . . . if its name and address are reasonably ascertainable."<sup>87</sup> Even more pertinent to the adequacy of published notice of personal property tax delinquency as statutorily provided for in West Virginia, Justice Marshall posited: "*Knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending.* The latter 'was the information which the [county] was constitutionally obliged to give personally . . . an obligation which the mailing of a single letter would have discharged.'"<sup>88</sup>

In light of broad principles articulated in *Mullane* and *Mennonite*, West Virginia's statutory requirement that published notice be provided to taxpayers regarding their delinquent personal property taxes<sup>89</sup> is plainly insufficient to apprise the taxpayer of either the impending distraint of his personal property, or the sale of his property following distraint. Clearly, many citizens who have failed to discharge their tax debts have the means readily available to them in order to determine whether their taxable property is subject to distraint, sale or some other statutory remedy for delinquency. The *Mennonite* Court held, however, that, "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation."<sup>90</sup>

Therefore, the firmly established principles of procedural due process, derived from a review of recent judicial decisions in the real property context, reveal that statutory notice in tax collection proceedings must be in such form as can be reasonably calculated to apprise the delinquent taxpayer, not only of his tax delinquency, but also of the consequences which his failure to satisfy the delin-

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minative of the nature and timing of the requisite procedures to satisfy due process. However, the balancing test has historically been applied in order to determine the nature and timing of such procedures and has not, in any reviewed opinions, been used to totally emasculate the *Mullane* standard of notice. To this writer, the crux of the majority opinion was that, regardless of any flexibility in taxation cases, taxpayers have a right to notice which is reasonably calculated to apprise them of the impending sale of their property.

87. *Id.* at 800.

88. *Id.* (citing *Schroeder v. New York City*, 371 U.S. 208, 214 (1962) (emphasis added).

89. W. VA. CODE § 11A-2-13 (1987).

90. *Mennonite Bd. of Missions*, 462 U.S. 399.

quency has upon his continued use and enjoyment of the property. In the absence of any statutory requirement that taxpayers be given either actual notice of the impending seizure of personality for delinquency, or, at a constitutional minimum, notice of the impending sale of the property following seizure,<sup>91</sup> it is likely that our court would find West Virginia's distraint statute to be constitutionally flawed.

Our inquiry should not stop with this conclusion. In an effort to ascertain the nature and form of any additional procedural safeguards which may be necessary for the distraint statute to survive constitutional scrutiny, it is necessary to examine the second fundamental facet of procedural due process: The citizen's right to be heard prior to final deprivation of any substantial property interest.

### *B. The Constitutional Parameters of the 'Right to be Heard in Taxation Cases*

The federal Constitution's due process guarantee has long required that a citizen be afforded the opportunity for some form of hearing before a fair and impartial arbiter prior to final deprivation of a substantial property interest.<sup>92</sup> However, the Supreme Court has also recognized throughout a long line of decisions that the nature and timing of such hearing will necessarily depend upon the facts of the individual case and the nature of the governmental interest at stake.<sup>93</sup> Indeed, the Court has held that the elements of procedural due process are not to be considered a "technical conception [of] inflexible procedures,"<sup>94</sup> but rather a "delicate process of adjustment" and a recognition that "what is unfair in one situation may be fair in another."<sup>95</sup>

Thus, the Supreme Court has consistently held that in certain "extraordinary situations," postponement of a hearing until after

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91. *Mullane*, 339 U.S. 306; *Mennonite Bd. of Missions*, 462 U.S. 791; *Don S. Co.*, 288 S.E.2d 491; *Cook*, 301 S.E.2d 837.

92. See generally J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 48, at 487-92.

93. See generally *Supreme Court Views*, *supra* note 32.

94. *Cafeteria & Restaurant Workers, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961).

95. *Joint Anti-facist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951).

the deprivation of a citizen's property may be justifiable.<sup>96</sup> The Court has also held, however, that such situations are "truly unusual."<sup>97</sup> The limited application of the "extraordinary situation" exception to pre-deprivation procedural rights was recognized in one recent case in which the Court stated:

Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force. The person initiating the seizure has been a governmental official responsible for determining, under the standards of a reasonably drawn statute, that it was necessary and justified in the particular instance.<sup>98</sup>

In 1976, in *Mathews v. Eldridge*,<sup>99</sup> the Supreme Court articulated a tri-partite balancing test which must be applied by lower courts in their determination of the nature and timing of the requisite hearing to satisfy procedural due process. In *Mathews*, the Court held that each of the following factors are critical to the identification and comparison of the competing interests of the government and its citizens:

First, the private interest that will be affected by the official action; second, the risk of the erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.<sup>100</sup>

In a number of taxation cases prior to the Court's adoption of this balancing test, the Court upheld several tax collection statutes which did not provide the delinquent taxpayer a predeprivation hearing, but which did provide the right to bring a subsequent suit for redress.<sup>101</sup> More recently, however, as a result of the Court's increased

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96. *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). For a summary of cases in which the Court has found postponement of the requisite hearing to be justified, see generally *Supreme Court Views*, *supra* note 32.

97. *Fuentes*, 407 U.S. at 90-91.

98. *Id.* at 91.

99. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

100. *Id.* at 335. See also *Waite v. Civil Service Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1977).

101. See, e.g., *Phillips*, 283 U.S. 589; *Springer*, 102 U.S. 586.

emphasis on procedural due process protection, the Court has held that some form of hearing is generally required *prior* to the deprivation of a citizen's property.<sup>102</sup> The Supreme Court has also held, however, that in those circumstances in which the government must act promptly in order to protect a vital public interest, or in those circumstances in which a meaningful predeprivation hearing would be impractical, a prompt post-deprivation hearing will be procedurally sufficient.<sup>103</sup>

Based upon the Court's modern due process decisions, it would seem logical to conclude that, when the government seizes property for delinquent taxes, the taxpayer should be afforded the opportunity for at least a prompt post-deprivation hearing at which time the propriety of the seizure can be determined. Nonetheless, a review of recent judicial decisions regarding the nature and timing of the requisite hearing in tax collection proceedings reveals a confusing disarray of decisions involving the interpretation and application of the Supreme Court's rulings in this area. For example, a number of courts have approved tax collection procedures that merely provide the delinquent taxpayer a subsequent suit for redress following seizure and sale of property for delinquency.<sup>104</sup> In contrast, other courts have taken an approach more consonant with modern due process analysis and have held that a taxpayer must be afforded the

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102. See, e.g., *Fuentes*, 407 U.S. 67; *Snidach*, 395 U.S. 337.

103. See, e.g., *Mitchell v. W.T. Grant*, 416 U.S. 600 (1974). See also *Paratt v. Taylor*, 451 U.S. 527 (1981) in which the Court stated:

These cases recognize that either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process.

*Id.* at 539-40.

Despite early criticisms by some authors concerning an apparent inconsistency in the Court's modern procedural due process decisions, more recent analyses have suggested that the cases can be reconciled and are representative of consistent due process principles. One author has succinctly stated, "the factual holdings of the cases suggest that the prejudgment seizure of an asset is constitutional only if there exist adequate safeguards that limit the occurrence of erroneous deprivations and allow the debtor to correct an erroneous deprivation in a timely manner." Note, *Due Process, Post-Judgment Garnishment and Brutal Need Exemptions*, 1982 DUKE L.J. 192.

104. See, e.g., *Bomher v. Reagan*, 522 F.2d 1201, 1202 (9th Cir. 1975). See also *Bormann*, 461 F. Supp. at 196.

opportunity for a prompt post-deprivation hearing wherein the propriety of the seizure may be contested.<sup>105</sup>

Therefore, any attempt to ascertain the nature and timing of the requisite hearing to satisfy procedural due process in tax collection cases is necessarily based upon often ambiguous and irreconcilable decisions.<sup>106</sup> Certain generalizations can be drawn, however, from several recent state and federal court decisions. As will be seen, these generalizations provide ample guidance for assessing the constitutional adequacy of West Virginia's distraint statute.

### 1. The Right to be Heard in Taxation Cases: An Issue Confused.

State and federal courts which have adjudicated the right to be heard in taxation cases are in overwhelming agreement that states may properly incorporate summary procedures, such as distraint of personalty, into their state tax collection procedures.<sup>107</sup> The majority of courts also agree that it is unnecessary to provide delinquent taxpayers with a hearing prior to seizure of their property for delinquent taxes, so long as a prompt, post-seizure hearing is provided prior to sale.<sup>108</sup> However, a substantial minority of courts have held that statutory provisions which afford the taxpayer the right to bring a subsequent suit for refund of taxes paid under protest is constitutionally sufficient.<sup>109</sup> Unfortunately, the courts which have taken the more restrictive view of procedural due process in taxation cases provide little analytical guidance into the propriety of their rulings.

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105. See, e.g., *Shaw*, 636 S.W.2d 186; *Arthur Treacher's Fish & Chips v. New York State Tax Comm'n*, 69 A.D.2d 550, 419 N.Y.S.2d 768 (1979); *T.M. Cobb Co.*, 16 Cal. 3d 606, 547 P.2d 431, 128 Cal. Rptr. 655; *Dupuy v. Superior Court*, 15 Cal. 3d 410, 541 P.2d 540, 124 Cal. Rptr. 900 (1975).

106. For a thorough analysis of this confusing area of the law, see generally Note, *supra* note 6.

107. See, e.g., *Shaw*, 636 S.W.2d 186; *Arthur Treacher's Fish & Chips*, 69 A.D.2d 550, 419 N.Y.S.2d 768; *Dupuy*, 15 Cal. 3d 410, 541 P.2d 540, 124 Cal. Rptr. 900; *T.M. Cobb Co.*, 16 Cal. 3d 606, 547 P.2d 431, 128 Cal. Rptr. 655; *Bomher*, 522 F.2d 1201; *Bormann*, 461 F. Supp. 193.

108. *Shaw*, 636 S.W.2d 186; *Arthur Treacher's Fish & Chips*, 69 A.D.2d 550, 419 N.Y.S.2d 768; *Dupuy*, 15 Cal. 3d 410, 541 P.2d 540, 124 Cal. Rptr. 900; *T.M. Cobb Co.*, 16 Cal. 3d 606, 547 P.2d 431, 128 Cal. Rptr. 655.

109. See, e.g., *Bomher*, 522 F.2d 1201; *Tavares v. United States*, 491 F.2d 725, 726 (9th Cir. 1974), cert. denied, 420 U.S. 925 (1975); *Bormann*, 461 F. Supp. 193.

In *Bormann v. Tomlin*,<sup>110</sup> a United States district court held, with little substantive discussion, that Illinois' summary administrative procedure providing for the seizure of personality to satisfy delinquent personal property taxes was constitutionally adequate. The court found that Illinois' tax collection statutes provided the citizen the right to bring a subsequent suit for refund of the taxes and that such procedure was sufficient to satisfy due process. The court supported its decision with little underlying rationale and merely stated, "[c]ourts have long upheld summary delinquent tax collection proceedings, including statutory methods of distraint, against due process challenges."<sup>111</sup>

Likewise, in *Bomher v. Reagan*,<sup>112</sup> the ninth circuit held that judicial review, available to a state taxpayer through a post-collection refund suit, was sufficient to satisfy procedural due process. As in *Borman*, the *Bomher* court provided little substantive discussion regarding the rationale underlying its ruling.<sup>113</sup> Both decisions relied almost exclusively upon the Supreme Court's early holding in *Phillips v. Commissioner*.

In *Phillips*, the Supreme Court upheld, in rather sweeping language, the constitutionality of summary procedures for the collection of delinquent taxes.<sup>114</sup> However, if the Court's reasoning in *Phillips* is carefully analyzed, it is apparent that the holding is much narrower than some lower courts have represented it to be. Indeed, the *Phillips* decision can be easily reconciled with the Court's modern due process approach. The taxpayer in *Phillips* had two alternative procedures available to protest the propriety of the governmental action, including the taxpayer's right to an administrative hearing prior to the tax, and the right for subsequent judicial review following payment of the tax under protest. Plainly, *Phillips* did not hold that the taxpayer's right to some form of hearing was obviated.<sup>115</sup>

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110. *Bormann*, 461 F. Supp. 193.

111. *Id.* at 195.

112. *Bomher*, 522 F.2d 1201.

113. *Id.* at 1202.

114. *Phillips*, 283 U.S. 589.

115. *Phillips*, 283 U.S. at 596-97. See generally Note, *supra* note 6, at 606.



In the more recent decision of *Commissioner v. Shapiro*,<sup>116</sup> the Supreme Court again recognized the constitutionality of summary tax collection procedures. However, in rather strong dicta, the Court posited that it was "very doubtful that the need to collect revenue is a sufficient reason to justify seizure causing irreparable injury without a prompt, post-seizure inquiry. . . ."<sup>117</sup> Several recent, well reasoned state court decisions adopted the *Shapiro* line of reasoning and held that taxpayers must be afforded the opportunity for at least a prompt post-deprivation hearing prior to sale of their property for delinquency.<sup>118</sup> These decisions implicitly reject the adequacy of a post-collection suit for redress, where the citizen has no other opportunity to be heard regarding the accuracy of the assessed taxes or the propriety of the seizure.

In *Shaw v. Phillips Crane & Rigging*,<sup>119</sup> the Supreme Court of Texas upheld a state summary procedure for collection of delinquent personal property taxes over constitutional challenge. The court held that existing statutory remedies, which afforded the taxpayer the right to contest any errors in assessment and which provided a waiting period during which the taxpayer could either satisfy his tax debt or otherwise contest the accuracy of the seizure, were adequate to protect the taxpayer's rights.<sup>120</sup> Similarly, in *Arthur Treacher's Fish and Chips v. New York State Tax Commission*,<sup>121</sup> a New York appellate court declared unconstitutional a section of that state's tax collection laws. The statutes<sup>122</sup> authorized issuance of a seizure warrant upon a delinquent taxpayer but failed to provide the citizen an opportunity for a prompt postlevy hearing to assess the validity of the Tax Commission's claims.<sup>123</sup> The court held that the tax collection scheme was constitutionally flawed since it failed to provide

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116. *Shapiro*, 424 U.S. 614.

117. *Id.* at 630 n.12.

118. *Shaw*, 636 S.W.2d 186; *Arthur Treacher's Fish & Chips*, 69 A.D.2d 550, 419 N.Y.S.2d 768; *Dupuy*, 15 Cal. 3d 410, 541 P.2d 540, 124 Cal. Rptr. 900; *T.M. Cobb*, 16 Cal. 3d 606, 547 P.2d 431, 128 Cal. Rptr. 655.

119. *Shaw*, 636 S.W.2d 186.

120. *Id.* at 188.

121. *Arthur Treacher's Fish & Chips*, 69 A.D.2d 550, 419 N.Y.S.2d 768.

122. N.Y. TAX LAWS §§ 1138, 1141(b) (McKinney 1987).

123. *Arthur Treacher's Fish & Chips*, 69 A.D.2d 550, 419 N.Y.S.2d 768, 773.

the taxpayer with at least an opportunity for a postlevy hearing prior to seizure of his property.<sup>124</sup>

While the reasoning articulated in cases such as *Bormann* and *Bomher* is quite abbreviated and is apparently based upon an overly broad interpretation of the *Phillips* decision, the reasoning articulated in cases such as *Shaw* and *Arthur Treacher's* is more consonant and more easily reconciled with the Supreme Court's modern due process analysis. Even so, the ambiguity in this area of the law precludes the extraction of any simple formula or any general rule regarding the hearing requirement of procedural due process in tax collection cases. Certainly, any further attempt to reconcile the judicial confusion on the issue is necessarily beyond the scope of this analysis. Suffice it to say that if West Virginia's tax collection procedures afford local taxpayers the right to some form of meaningful opportunity to be heard, either prior to or promptly following seizure of their property for delinquency, such procedures are sufficient to satisfy procedural due process.

It is, therefore, necessary to examine West Virginia's distraint statute, in conjunction with other pertinent code provisions and applicable West Virginia Supreme Court of Appeals decisions, in order to determine the constitutional adequacy of the delinquent taxpayer's right to be heard.

## 2. West Virginia's Statutory and Common Law Treatment of the Right to be Heard in Taxation Cases.

West Virginia's Supreme Court of Appeals has consistently maintained that it will attempt to "examine our statutes in an attempt to avoid fatal friction with due process guarantees,"<sup>125</sup> especially when called upon to scrutinize statutes which were promulgated to advance some important governmental or public interest. Although the court has recognized certain exceptions to the pre-seizure hearing requirement for procedural due process, it has also held that such

124. *Id.* A post levy hearing in these cases is consistent with a pre-seizure hearing since the court held that the hearing must be provided prior to seizure of the citizen's personality.

125. *Yanero*, 163 W. Va. at 223, 256 S.E.2d at 757.

exceptions do not emasculate the need for any hearing whatsoever: "Regardless of flexibility, before there can be any final adjudication of property rights, a person deprived of property must be afforded notice and a reasonable opportunity to be heard."<sup>126</sup>

West Virginia's distraint statute does not expressly provide the delinquent taxpayer the right to either a predeprivation or prompt postdeprivation hearing. However, other provisions within our taxation statutes provide the taxpayer both administrative and judicial methods to contest the accuracy of taxes assessed upon his property.<sup>127</sup> Other state and federal courts examining the hearing requirement in taxation cases have found similar provisions sufficient to satisfy procedural due process.<sup>128</sup>

In *Shaw v. Phillips Crane & Rigging*,<sup>129</sup> a taxpayer alleged that the seizure and threatened sale of personalty to satisfy delinquent personal property taxes was unconstitutional since he was not provided a "special hearing either before or after seizure . . . to contest any possible mechanical or mathematical error made by the Assessor in calculating the amount shown on the delinquent tax rolls."<sup>130</sup> The Supreme Court of Texas held that no "special hearing" was necessary, since the taxpayer was afforded several pre-collection methods of contestation, including the right to appear before a board of equalization and review.<sup>131</sup>

West Virginia Code § 11-3-24 gives a taxpayer the right to contest his assessed taxes before the county commission.<sup>132</sup> The county commission, sitting as a board of equalization and review, may be addressed by the taxpayer prior to the levy and collection of the tax.

126. *Anderson v. George*, 160 W. Va. 76, 78, 233 S.E.2d 407, 408 (1977).

127. See W. VA. CODE § 11-3-24 (1987) (Review and Equalization by County Commission); W. VA. CODE § 11-3-24a (1987) (Protest to Assessor, Appeals to Circuit Court); W. VA. CODE § 11-3-25 (1987) (Relief in Circuit Court Against Erroneous Assessments); W. VA. CODE § 11-3-27 (1987) (Relief in County Commission Regarding Erroneous Assessments).

128. See, e.g., *Shaw*, 636 S.W.2d 186; *Borman*, 461 F. Supp. 193.

129. *Shaw*, 636 S.W.2d at 188.

130. *Id.* In *Shaw*, these remedies included the right to bring a declaratory judgment action to determine the accuracy of taxes assessed, the right to bring a suit to enjoin the collection of allegedly illegal taxes, and the right to appear before a board of equalization and review.

131. *Id.*

132. W. VA. CODE § 11-3-24 (1987).

Traditionally, West Virginia's Supreme Court of Appeals has lent considerable deference to this review system. In a recent decision, the court stated unequivocally, "[t]he adequacy of the review system provided by West Virginia Code § 11-3-24 is confirmed by the numerous opinions of this court."<sup>133</sup>

Based upon the court of appeals' repeated approval of W. Va. Code § 11-3-24, it is likely that the court would find that the distraint statute, when read in conjunction with W. Va. Code § 11-3-24, comports with the preseizure hearing requirement for procedural due process. Moreover, West Virginia's statutory tax assessment and collection scheme, when viewed in its entirety, is even more satisfactory of minimum due process requirements than some courts have required of similar state tax collection statutes. There are, however, certain portions of West Virginia's code pertaining to the assessment and levy of personal property taxes which could potentially impact upon the adequacy of the hearing afforded by W. Va. Code § 11-3-24 to personal property owners. In this regard, it is necessary to briefly review the process by which personal property taxes are assessed and levied in West Virginia.

In West Virginia, real and personal property taxes are assessed on July 1 of each year by county assessors and their deputies. All assessments, and the land and personal property books reflective thereof, are to be completed not later than January 30th of that year.<sup>134</sup> Thereafter, commencing no later than February 1 and continuing until no later than February 28, the county commission examines the assessments submitted.<sup>135</sup> Any errors in assessments are corrected. Once the commission has completed its review and equalization of the property books, the books are delivered to the county assessors, and the levies are extended as provided by law.<sup>136</sup>

West Virginia's Supreme Court of Appeals has held that it is the taxpayer's responsibility to see that his concerns are presented

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133. See, e.g., *State ex rel. Ayers v. Cline*, 342 S.E.2d 89, 94 (W. Va. 1985).

134. W. VA. CODE § 11-3-2 (1987). See also *id.* §§ 11-3-24a & -25 regarding the taxpayer's right to protest to the assessor and appeal to the circuit court regarding allegedly erroneous assessments during a statutorily specified period of time.

135. W. VA. CODE § 11-3-24 (1987).

136. *Id.*

to the board of equalization and review in a timely manner to enable the board to adequately review the taxpayer's protests.<sup>137</sup> The taxpayer's duty to present protests before the board regarding personal property assessments is expressly required by W. Va. Code § 11-3-24:

If any person fails to apply for relief at this meeting, he shall have waived his right to ask for correction in his assessment list for the current year and shall not therefore be permitted to question the correctness of his list as finally fixed by the county commission, except on appeal to the circuit court.<sup>138</sup>

However, one aspect of the taxpayer's statutory right to contest his property valuations before the Board of Equalization and Review affords real property owners substantially greater procedural protection than is afforded to personal property owners.<sup>139</sup> West Virginia Code § 11-3-2a requires that county assessors provide actual notice to individuals and published notice to entire districts of real property owners if the assessed values of their real property are more than ten percent greater than were assessed on the subject property the previous year. Such notice is to be given to the landowner at least fifteen days prior to the first meeting of the Board of Equalization and Review and must advise the landowner of his statutory right to appear before the Board to seek a review and adjustment of the assessment.<sup>140</sup>

No such provision requiring that personal property owners be advised regarding any increased valuations in their property is required by current law. Thus, personal property owners may not be afforded any notice whatsoever regarding assessed tax increases, nor any notice of the right to contest increased assessments prior to final fixing of the yearly taxes. Therefore, it may occur that, by the time personal property owners become aware of substantial increases in their assessed personal property taxes, the taxes are due and payable and the statutory time has passed within which the taxpayer may appeal.<sup>141</sup>

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137. *Kemp v. Boyd*, 166 W. Va. 471, 481, 275 S.E.2d 297, 305 (1981).

138. W. VA. CODE § 11-3-24 (1987).

139. W. VA. CODE § 11-3-2a (1987).

140. *Id.*

141. *But see* W. VA. CODE § 11-3-27 (1987) which extends the period to one year in which the

Correction of this anomaly within our tax statutes would provide personal property owners with notice of proposed increases in personal property taxes and thus a more meaningful opportunity to be heard regarding the propriety of such increases. To be sure, the taxpayer's right to contest disputed assessments in his property values can be only as effective as the taxpayer's knowledge of that right. Revising this portion of our tax statutes would not only establish a more uniform assessment and review procedure between real and personal property owners but would also likely decrease the number of recalcitrant personal property owners who refuse to pay their taxes because of what they may consider an unfair process of review.

## V. CONCLUSION

Based upon the modern trend of procedural due process analysis, West Virginia's distraint statute for the collection of delinquent personal property taxes appears to be both constitutionally flawed and procedurally inadequate for its intended purpose. As currently written, the statute is a remnant of a bygone era in which tax collection remedies did not command even the most minimal procedural protection prior to deprivation of a citizen's property.

The most obvious procedural flaw is the absence of any requirement that the taxpayer be afforded proper notice, either of the impending seizure of his property for delinquency, or, at a minimum, notice promptly following the seizure which would apprise the taxpayer that his property may be sold to satisfy his tax debt. According to a number of recent decisions concerning the adequacy of notice in the real property context, statutorily prescribed notice by publication, which is currently a part of West Virginia's personal property tax collection scheme, is likely to be found insufficient to satisfy modern procedural due process requirements. Certainly, no basis has been found in case law to justify less constitutional protection for personal property owners than that which is provided to

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taxpayer may seek relief for erroneous entries "resulting from clerical error, or a mistake occasioned by an unintentional or inadvertent act as distinguished from a mistake growing out of negligence or the exercise of poor judgment."

owners of real property. Although the distraint statute does not facially require that taxpayers be afforded a hearing prior to distraint of their personalty, it is probable that this facet of procedural due process is satisfied if the distraint statute is read in conjunction with other applicable statutory provisions. In other jurisdictions, statutory procedures, similar to those articulated in W. Va. Code § 11-3-24 which provide taxpayers the right to contest the accuracy of taxes assessed upon their property and the right to judicial review prior to the time when taxes must be paid, have been declared sufficient to satisfy the preseizure hearing component of procedural due process. However, this area of the law is unsettled, and it is difficult to reconcile many of the judicial decisions regarding the nature and timing of the hearing component of procedural due process in tax collection cases. West Virginia's Supreme Court of Appeals has considered the review system afforded by W. Va. Code § 11-3-24 in the real property context and has declared it to be constitutionally sound. When the present review system is viewed from a personal property owner's standpoint, however, it is evident that real property owners are afforded more procedural protection than that which is provided to personal property owners.

Virtually all courts which have addressed the propriety of summary administrative procedures for the collection of delinquent taxes are in overwhelming agreement that when adequate procedural safeguards are implemented into state tax collection schemes, the states may properly resort to distraint of property to satisfy tax delinquency. Considering that distraint procedures are viable tax collection options when equipped with procedural due process safeguards, West Virginia's legislature should examine the current distraint statute to determine whether the procedure will have any future role in the collection of delinquent personal property taxes within this state. The practical difficulties attendant to other procedures for the collection of such taxes would appear to make the distraint of personalty an efficient method of tax collection. Similar distraint provisions for the collection of other state taxes have recently been amended to satisfy procedural due process,<sup>142</sup> and as a practical mat-

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<sup>142</sup> See W. Va. Code § 11-10-13k (1987).

ter, the legislature need look no further than these statutes for intelligent guidance in reforming the personal property distraint statute.

As the West Virginia Supreme Court of Appeals has stated, "It is the policy of the State that the public revenues should be speedily assessed and collected in order that the government may function. The public revenues are the lifeblood of the body corporate. . . ." <sup>143</sup> Considering the vital governmental interest underlying this articulated policy, there should be no place in the laws of this state for procedurally inadequate and constitutionally infirm tax collection statutes. By amending the distraint procedure, West Virginia's legislature would not only provide local officials with an efficient and practical procedure to carry out their duties of revenue collection but would also protect the constitutionally guaranteed property rights of its citizens in the process.

SUSAN B. SAXE

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143. *Cline*, 342 S.E.2d at 95.